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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1954

No. 405

In the Matter of

LEE ROY MURCHISON

In the Matter of

JOHN WHITE

On application for writ of certiorari to the Supreme Court of the State of Michigan.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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I

Reference to Official Reports.

Since the writ, if issued, would bring up for review only the final judgments of Michigan's highest court

In the Matter of White, 340 Mich 140, 65 NW 2d 301,

—and—

In the Matter of Murchison, 340 Mich 151, 65 NW 2d 296,

it cannot be said that review of the opinions of the court of original jurisdiction, is also sought by petitioners.

II

Jurisdiction.

a. We agree that final judgments of the Michigan Supreme Court were entered on the 6th day of July 1954.

b. Counsel also correctly summarize the proceedings which followed such decisions, and we concede that the petition for certiorari was timely filed.

c. Although jurisdiction of this Court is invoked under terms of 28 USC § 1257 (3), counsel fail to show any "special and important reasons therefor," nor do they demonstrate that the highest state court has decided a federal question of substance, Revised Rule 19 (1).

III

Questions Presented

Since none of the federal questions posed on page 3 of the petition, was necessarily decided by the Michigan Supreme Court, the only questions for immediate consideration are as follows:

1. Did the court of last resort decide a federal question of substance?

2. Have petitioners shown "special and important reasons" for review on certiorari of the opinions and judg-

ments of the Supreme Court of Michigan as required by Revised Rule 19 (1) ?

We respectfully submit that each of these questions should be answered in the negative.

IV

Constitutional Provisions, and Statutes Involved.

1. The "statute" here challenged comprises 8 sections of Chapter 7 of the Michigan Code of Criminal Procedure,[1] but the court below merely construed and applied it without testing its validity by any Federal constitutional principle. The weakness in petitioners' position lies in the fact that in the trial court White and Murchison invoked provisions of the very "statute" which they now attack on federal grounds.[2]

2. Article IV of Michigan's Constitution (1908), requiring division of the powers of government into the traditional three departments, and expressly forbidding invasion into either, as invoked by Murchison (M.R. 2, Petition, p. 65) and White (W.R. 3, Petition, p. 69), presented a non-federal question controlled by State law.[3]

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[1] Michigan Code of Criminal Procedure, Chapter 7, §§ 3, 4, 4a, 5, 5a, 6a and 6b [Mich. Stat. Ann. (Henderson) 1953 Cum Supp §§ 28.943 28.946 (2)].

[2] Section 3 is invoked as authority for having counsel in the court room during the investigation, while § 4 is said to disqualify the judge from hearing the contempt charge.

[3] Dreyer v. Illinois, 187 US 71, 84; Crowell v. Benson, 285 US 22, 57; Highland Farms Dairy v. Agnew, 300 US 608, 612.

3. The Fourteenth Amendment was not involved in the decision of the court below.

V

Counter-Statement of the Case, and Issues Raised in State Court.

This counter-statement is deemed necessary in correcting inaccuracies and omissions in the statement of petitioners, Revised Rule 40 (3).

In the Matter of John White.[1]

1. The witness White, on examination (W.R. 50-60) before the judge assigned by the court of first instance to conduct the inquiry here in question (W.R. 1), not only declined to answer any questions unless his attorney was present in the court room; he also refused (W.R. 56) to state whether his counsel had accompanied him to court that morning or whether his attorney was "outside in the hall," or whether he had conferred with an attorney before coming to court (W.R. 56-57). And he further declined (W.R. 57) to name the lawyer whose presence he desired.

2. While the formal order (W.R. 13-14) issued in White, required the witness to show cause why he should not be punished for criminal contempt of court, the judge interpreted this language to mean that White was commanded to show "why he should not be adjudged guilty of contempt of court" (W.R. 85), an interpretation which White's

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[1] Unless otherwise plainly indicated, numbers in parentheses preceded by initials "W.R." refer to pages of the typewritten record in the Matter of John White as certified by the clerk of the Michigan Supreme Court.

counsel did not dispute when opportunity afforded (W.R. 85, 88).

3. The order to show cause (W.R. 13) was met by White's counsel in open court by a motion to dismiss (W.R. 90) and a further motion (W.R. 90-91) to transfer the matter to another judge because of lack of jurisdiction in Judge O'Hara (W.R. 91).

While such motions, particularly that which sought dismissal of the order to show cause, were predicated in part upon constitutional grounds (W.R. 104, 105, 106, 109, 116), counsel, in the main, relied upon the terms, conditions and provisions of the statute here in question (W.R. 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 107, 108, 110). And so far as separation of powers of government was concerned, reliance was upon Article IV of the State Constitution, rather than upon Article 1, § 1 or Article IV, § 2 of the Constitution of the United States. It was urged, however, that if the judge's interpretation of the statute were correct (W.R. 111-116), "the entire act would be unconstitutional" (W.R. 116).

In the Matter of Lee Roy Murchison.[4a]

1. The order to show cause directed to Murchison (M.R. 12) was issued on the 6th day of May, returnable on the 10th day of May 1954 (M.R. 14).

2. Such order was based upon an alleged contempt of court committed by Murchison when on the 7th day of April 1954 "he had testified falsely by denying that he had

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[4a] Unless otherwise plainly indicated, numbers in parentheses preceded by initials "M.R." refer to pages of the certified record in the matter of Murchison.

at any time, specifically on the 9th day of March 1954, visited the residence of . . . Edward Spencer" (M.R. 5, 6).

3. The following should be added to the statements set forth in the petition for certiorari, pp. 4, 5, 6 and 9:

The contempt hearings were held in open court. The front door of the court room was opened wide so that any person desiring to attend could do so. At various times during the hearings many attorneys and other persons were present in the court room, including representatives of the press (M.R. 8).

At the outset of the hearing in Murchison (M.R. 60), counsel challenged the right of the judge to proceed in the matter "because of a prohibition in the statute," and he insisted that the judge who had conducted the investigation as a grand juror should not act in special proceedings to hear and determine the question of contempt "because of the provisions of the statute regulating procedure and hearings of this nature," § 4 (M.R. 64). This objection, based upon the statute here in question, was pressed throughout the hearing conducted on the 10th day of May 1954 (M.R. 86, 128, 136, 137, 139).

It may be noted that the judge's adjudication of contempt of court was based not alone upon testimony adduced in the grand jury room, but upon further testimony taken in open court during the public hearing (M.R. 67-182).

At the close of testimony on May 10, 1954 (M.R. 129 et seq.), counsel for Murchison stated (M.R. 8) that if the matter were continued for a few days, he would produce witnesses from Shrewsbury, Ontario, Canada, "to prove Officer Murchison was at that place on March 9, 1954." The hearing was then adjourned to May 12, 1954, to give counsel

opportunity to present testimony on behalf of his client, but on May 12, when court reconvened, counsel offered various objections to the proceedings (M.R. 141-143), and stated he did not desire to offer any testimony on behalf of Officer Murchison (M.R. 8).

Counsel stated that in view of several circumstances (M.R. 142-143) including the fact that Murchison protested the proceedings

> "for the reason that for the grand juror to hear such order to show cause would be a violation of the provisions of the statute regulating the one-man grand jury,"

he declined to proceed further in the matter (M.R. 143). Legal arguments being invited by the court, counsel raised the following points:

(a) He contended the provisions of the statute disqualified the judge from presiding in any proceedings in the nature of a contempt growing out of his grand jury investigation, and he argued the matter at length (M.R. 144-146).

(b) The order to show cause, it was said, violated the Due Process Clause in that the respondent was not given an opportunity to have a formal indictment filed against him specifically setting forth the charges to be proved (M.R. 146), and this was the first intimation of a constitutional objection.[5]

(c) Counsel then stated (M.R. 146-147) his position to be as follows:

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[5] We note, however, that this point of procedural due process is not pressed in the petition for certiorari.

"Third, that the court is without authority either by statute or any theory of the common law, to cite the respondent for contempt expressly in view of the provisions of the statute forbidding such action. And, of course, that the statute itself is unconstitutional in that it departs from the ordered scheme of personal liberty established by the bill of rights and in that connection, . . . this entire . . . act is in itself, in its very essence repugnant to our ideals of justice and due process of law, in that having these extraordinary powers granted by the statute, and reposing the authority in one person, it departs completely from the concept of grand jury investigations as known to the common law, and the provisions of the statute disqualify a judge from sitting in contempt proceedings, is no more or less that a restatement of what I contend has always been the law, that a grand jury or an investigation of this kind cannot try any issue growing out of that investigation."[6]

For the reasons assigned, counsel submitted that the court should disqualify himself from hearing the matter, discontinue the proceedings, and refer them to the presiding judge for assignment to some other judge for hearing (M.R. 148).

Counsel having read into the record (M.R. 148-149) the provisions of § 5 of the Act, the matter was adjourned to May 14, 1954 (M.R. 155).

When court reconvened on the 14th day of May, and after further testimony had been taken (M.R. 158-173), defense counsel again stated (M.R. 174) he had no testimony to offer and urged that a person "should be able to rely upon the plain, unequivocal language of the statute of his state."

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[6] It is rather difficult to say whether in this instance, counsel is relying upon or attacking the validity of the statute in question.

The burden of showing such a statute to be in violation of the fundamental law is [he said] upon the party making such an assertion,[7] and, counsel added:

> "Therefore, the respondent, Lee Roy Murchison, relying upon the plain, unequivocal language of the One Man Grand Jury Statute . . . as to procedure in trials for contempt of such grand jury, again protests these entire proceedings as being in violation of the law in such cases made and provided."

Each of these petitioners having been adjudged guilty of contempt of court and being sentenced therefor, applications for leave to appeal to the Michigan Supreme Court, based upon concise statements of facts and proceedings certified by the trial judge, Michigan Court Rule 60 (2), were duly filed, considered and granted. Based upon such applications and concise statements,[8] the Supreme Court affirmed. Thereupon each appellant filed a motion for rehearing and a supporting brief; the State filed a brief in opposition; and the Court on September 8, 1954, denied the applications for rehearing. The pending applications for writs of certiorari followed in due course.

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[7] What counsel apparently had in mind was the thought entertained by the judge and later expressed in a formal opinion (M.R. 52), that §§ 4 and 5 of the Act deprived courts of record of their inherent power to punish for contempt and that they were therefore unconstitutional.

[8] To facilitate a speedy hearing and determination of the cause, the Michigan Supreme Court waived the settlement and printing of a record on appeal and accepted the typewritten applications and concise statements in lieu thereof.

VI

Reasons for Opposing.

First: The Michigan Supreme Court did not decide a federal question of substance.

1. Throughout each hearing held in open court, counsel for the accused stressed one specific point: that under the terms of § 4 of the Act [Michigan Stat. Ann 1953 Cum. Supp. § 28.944], the judge conducting an inquiry was disqualified from "hearing any charge of contempt," and in printing the Act as an appendix to their petition for certiorari, p. 20, they italicize the language upon which they rely.

Only White contended that when examined as a witness he was entitled to the presence of counsel in the court room of the grand juror,[9] and, while he based his position in part (W.R. 104-106, 109, 116) upon the fundamental right of an accused in all criminal prosecutions "to have the assistance of counsel for his defense," as guaranteed by the 5th through the 14th Amendment,[10] he relied strongly, and in the main (W.R. 90-104, inclusive, 107, 108, 110), upon provisions of the Act found in § 3 [Michigan Stat. Ann. 1953 Cum. Supp. § 28.943] which read as follows:

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[9]
Murchison when called before the grand juror asserted no right to counsel but testified freely concerning the subject matter of inquiry but, as later adjudged, perjured himself.

[10]
Counsel for White entered his appearance as attorney for the "witness" rather than the "defendant" (W.R. 89-90). From this and other significant facts it may be urged that the 5th and 14th Amendments do not apply to a "witness" called before a grand jury

"Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. All matters so revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in said section."

2. In concluding (Pet'n, p. 49) that those portions of § 4 of the Act which purport to deprive the court of power to try contempts arising from grand jury proceedings, are void because they constitute an undue interference with the inherent power of state constitutional courts to punish for contempt, the trial judge, in a written opinion filed in Murchison, (Pet'n, p. 28), and adopted by him in White (W.R. 111-112), held as follows:

(1) A grand juror is a judicial officer to whom an investigation is assigned by law (Pet'n, pp. 33-35).[111]

(2) The recorder's court of the City of Detroit possesses all of the constitutional, inherent powers of a circuit court to punish for contempt (Pet'n, pp. 35-39).

(3) The legislature of Michigan could not and by the Act did not deprive courts of records of their inherent power to punish for contempt when a restriction upon such power was attempted in § 4 of the Act (Pet'n, pp. 40-48).

(4) Even if §§ 4 and 5 of the Act, as tested by the State Constitution, are valid and binding on the recorder's court

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[111] Citing In re Slattery, 310 Mich. 458; certiorari denied, 325 US 876.

of Detroit, they do not apply to the contempt involved in Murchison (Pet'n, pp. 48-49).

And in rejecting White's claim that under express terms of § 3 of the Act he was entitled to counsel in the court room of the grand juror when called upon to testify as a witness (W.R. 119-137), the trial judge merely construed the language of that section, thus passing upon no federal question although, in giving effect to the legislative intent, he did cite federal authority (W.R. 133-135),

In re Black, 47 F. 2d. 542, 543,

for the proposition that neither at a trial nor before a grand jury is a *witness*, as distinguished from an *accused person*, entitled to have the aid of counsel when testifying, for such a witness, in the words of Judge Augustus N. Hand, *In re Black, supra*, "is not entitled to be furnished with facilities for evading issues or concealing true facts." Such a witness does not come within the Sixth Amendment entitling the *accused* in all criminal prosecutions "to have the assistance of counsel for his defense."[12]

3. The Supreme Court of Michigan, in reviewing *White* (Petition, p. 54), 340 Mich 140, 65 NW 2d 296, considered only two questions.

(1) Is a judge of the recorder's court of the city of Detroit, sitting as a judge of the recorder's court under

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[12] Under the express terms of § 3 of the Act, as applied to every witness who appeared before the grand juror in this cause, White had the right to counsel at any reasonable time or place except when testifying in the court room of the grand juror, nor will it be denied that whenever the grand juror was sitting, counsel for such witnesses were present in the corridor. White, however, refused (W.R. 56-57) to state whether his counsel were present in the hallway, or had accompanied him to court, or whether he had conferred with counsel before coming to court.

CLS 1952, § 767.3 (Stat Ann 1953 Cum Supp § 28.943) disqualified by the provisions of CLS 1952, § 767.4 (Stat Ann 1953 Cum Supp § 28.944) from citing a witness for contempt and, thereafter, hearing the contempt proceedings himself, where the alleged contempt arose in the course of a grand jury investigation in the presence of him as the grand juror?

(2) Is counsel for a witness called before a one-man grand jury entitled under CLS 1952, § 767.3 (Stat Ann 1953 Cum Supp § 28.943) to be present in the grand jury room during the testimony of his client?

The answer to each question was in the negative, and in coming to its conclusion upon the second issue the Court took into consideration

> "that a witness before a grand jury is not on trial for any offense and that secrecy is a paramount adjunct of a grand jury."

Nor did the Court think that the legislature intended, in enacting the Act,

> "that a witness not on trial for any offense was entitled to have an attorney at his elbow to advise him whether or not he should answer a question put to him. We are of the opinion that a witness was entitled to have legal counsel before or after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand juror. We hold that a witness legally called to testify before a grand jury is not entitled to have an attorney with him when he is so testifying."

The Court, in *Murchison* (Petition, p. 49), 340 Mich. 151, 65 NW 2d 301, followed its opinion in *White*, holding

that the judge of the recorder's court was not disqualified to hear the charges of contempt, and further, that the testimony at the contempt hearing justified the finding of the recorder's court judge that Murchison had testified falsely in the grand jury. Since he testified freely in the grand jury, and obviously falsely, the constitutional issue that he could not be compelled to answer without a waiver of prosecution, was not involved.

We therefore respectfully submit that the Supreme Court of Michigan decided no federal question.

4. Nor can it be said that the questions presented, even though passed upon by the highest court of the State, possess substance.

a. It is first contended that in acting as a grand jury, the court was acting in an administrative and/or executive capacity, and that to combine these functions is in derogation of the State Constitution of 1908, Article IV. And, it is said (Petition, pp. 12-13), that whenever the question has been presented as to whether a grand jury inquiry is a judicial one, the courts have answered in the negative, and reliance is placed in part upon *In re Oliver*, 333 US 257, esp., the concurring opinion of Mr. Justice Rutledge.

The trouble with such an argument, however, is that it is based primarily upon a provision of the Constitution of the State of Michigan, Article IV, and not upon the Federal Constitution. Moreover, in construing the Act, the highest court of the State has held,

> *In re Slattery*, 310 Mich. 458,
> certiorari denied, 325 US 876,

that a grand juror acting under the Act is a judicial officer, not a prosecuting attorney, policeman or detective, and that

the Act does no violence to Article IV of the Michigan Constitution which provides for the division of powers of government into the three traditional departments.

We therefore submit that the question presented a problem controlled by state law,

Dryer v. Illinois, 187 US 71, 84;

Crowell v. Benson, 285 US 22, 57;

Highland Farms Dairy v. Agnew, 300 US 608, 612.

b. Counsel's next point (Petition, p. 14, par. 3), that the interpretation given to § 3 of the Act amounts to a denial of due process, is also predicated upon the premise that the grand juror should not exercise executive or administrative powers and therefore deserves no further consideration.

c. The final point (Petition, p. 15, par. 4) seems to be that the contempt proceedings held in camera violated the principles which guided this Court *In re Oliver*, 333 US 257.

The obvious answer is, of course, that the hearings on contempt charges were not held in camera and that the judge of the trial court was guided throughout by principles announced in the case of *Oliver*.

Each person accused of contempt was served with due notice of such hearing and he was informed of the nature of the offense; he had a public trial after reasonable opportunity to prepare therefor; he had the right to examine in a public court room the witnesses against him; he was accorded the right to testify in his own behalf, a privilege which he neglected; and each person so accused was rep-

resented by counsel throughout the proceedings in open court.[13]

Second: The petition in this cause fails to disclose any "special and important reasons" for granting the writ of certiorari. Revised Rule 19.

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[13] It is this which distinguishes Courtney v. Lockett, 175 Kan. 704; certiorari granted Oct. 15, 1954, No. 179. There the petitioner was adjudged guilty of contempt without a public hearing. In re Oliver, 333 US 257.

VII

Conclusion

The record in this cause fails to reveal any federal question of substance decided by the highest court of the State of Michigan, or any special and important reason for granting a writ of certiorari to review the final judgment of the court below. For these reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully Submitted,

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